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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CARL J. BATTER
910 Seventeenth St., N. W.
Washington 6, D. C.

FRANK J. GAGEN, JR.
29 So. La Salle St.
Chicago 3, Ill.

ANNA R. LAVIN
1 North La Salle St.
Chicago 3, Ill.
Attorneys for Petitioner

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Sam Achilli, by his undersigned attorneys, respectfully prays for a writ of certiorari to The United States Court of Appeals for the Seventh Circuit in the foregoing cause.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on June 5, 1956

(Pet. A-1 to A-16) and remains unreported as of this date. Said opinion is contained herein in the Appendix hereto, pages A-1 to A-16.

The petition for rehearing was denied by the Seventh Circuit Court of Appeals on July 31, 1956 (Pet. A-17 to A-20). The opinion denying said petition for rehearing is unreported as of this date. Said opinion is contained herein in the Appendix hereto, pages A-17 to A-20.

The order of the Seventh Circuit Court of Appeals denying the petitioner's motion for leave to proceed in the United States District Court for the Northern District of Illinois under Rule 35, Federal Rules of Criminal Procedure remains unreported as of this date. Said order is contained herein in the Appendix hereto, page A-24; and the motion, collateral motion and order appear herein in the Appendix, pages A-19-22, 23, 25.

JURISDICTION

The judgment of the Seventh Circuit sought to be reviewed is dated June 5, 1956 (Pet. App. p. A-1) and it was entered on that date.

The order denying rehearing is dated July 31, 1956 (Pet. App. p. A-17) and it was entered on that date.

The order denying the motion to proceed before the District Court pursuant to Rule 35 of the Federal Rules of Criminal Procedure is dated August 13th, 1956 (Pet. App. p. A-24) and it was entered on that date.

The order granting an extension to time to and including September 20, 1956 in which to file this petition for certiorari is dated August 23rd, 1956 and was granted by Mr. Justice Minton.

Jurisdiction is conferred upon the Supreme Court of the United States to review this cause by writ of certiorari by Section 1254 of the Judicial Code (Title 28, U.S.C.A.) as enacted June 25, 1948; and the petition is timely within the purview of Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Can the United States Attorney, in a criminal income tax evasion case, in adducing proof of his case-in-chief—as distinguished from corroboration—depart from the manner of determining taxable net income followed by the Commissioner of Internal Revenue, that is, by making specific adjustments to the items of income, revising items of income reported and disallowing claimed deductions; and proceed by proof of the Net Worth method; or, is the United States Attorney in adducing proof in his case-in-chief, required to adhere to the method that the Commissioner of Internal Revenue uses to clearly reflect the income?

2. Where the United States Attorney, in a criminal tax evasion case, departs from the manner of determining taxable net income pursued by the Commissioner of Internal Revenue in his audit of a taxpayer's return, and proceeds to prove his case-in-chief by the Net Worth method, is evidence of Net Worth admissible in the absence of it being grounded on evidence that the Commissioner of Internal Revenue, personally, is of the opinion that such Net Worth method does clearly reflect the income?

3. Is it proper and in accordance with due process for the Court below where it finds "conflicting testimony with respect to each of them" (Pet. A-9) respecting glaring discrepancies in the closing Net Worth

to nevertheless hold "there was sufficient evidence to submit to the jury upon each of these matters" (Pet. A-10) and fail to reverse the conviction; or, should the Court below—under circumstances where its more exacting and leisurely examination of the actual transcript as contracted with the jury's recollection of the testimony taken over a period of a month and covering three years of activity, as well as a jury's lesser ability to comprehend the import of a myriad of details of the transactions comprising such Net Worth—hold it lacks probative value and reverse the conviction?

4. Is proof of a "likely source" of income, standing alone, without proof of the use of such funds in the acquisition of assets or the liquidation of liabilities sufficient to support the increase in Net Worth computation adduced as proof of unreported taxable income in a criminal trial; or, is it necessary to prove that the increases in Net Worth are the result of the use of such "likely source" of funds?

5. Was the Court below correct in holding that a partner cannot embezzle funds from a partnership of which he is a member, and that he is accountable to his partner for only one-half of such funds; or, is a partnership under the laws of Illinois a separate entity in which the partners each hold an undivided interest in all the partnership assets, and, a fortiori the secret retention of such funds not condoned constitutes embezzlement and therefore not taxable income?

6. Where a remark during the trial by the prosecutor in the presence of the jury is immediately followed by a defense motion for a mistrial, said motion being denied; and where the prosecutor did in the final part of his summation to the jury make

eighteen remarks so grave as to cause defense counsel to object twice and to ask the Court to instruct the jury that such remarks were made at a time when, under the rules, the defendant could not respond, which instruction was given; and the Court below characterized three of the remaining sixteen instances in language as follows:

> "We do not condone the prosecutor's unqualified statement that all defense witnesses were unwilling witnesses, responding only to subpoena." (Pet. A-3)

and

> "Although counsel's reference to the capital stock was unwarranted, it was an invited response to defense counsel's assertion and argument to the jury that the value of the corporate stock had been omitted from defendant's opening net worth statement." (Pet. A-3)

and

> "Government counsel may, at times, have been an overzealous advocate." (Pet. A-5)

was the Court below correct in holding that absent specific objection in each of the sixteen instances at the time of utterance, claim of prejudicial misconduct comes too late; or, was the objection in the form of an instruction timely, and as a matter of public interest is it not a duty of a Court of its own motion to protect a defendant in his right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice?

7. Whether the factual allegations of the indictment, which state offenses provided for with articulate specificity under the provisions of Title 26 U.S.C., § 3616 (a) (Internal Revenue Code of 1939, Section

3616 (a)), are not excepted from operation of § 145(b) of Title 26 U.S.C. (Internal Revenue Code of 1939, Section 145 (b)), a statute which in the generality of its provisions may be said to encompass the same offenses?

8. Whether the Court of Appeals below may dismiss a jurisdictional attack relating to the sentence imposed in the proceedings before it, without making a determination of the merit of the attack, even though the attack in its present form was never raised before Petition for Rehearing?

9. Was the Court below correct in holding that the question of distinction between Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939 was not raised below and not relied on on appeal, until petition for rehearing; or, did the Motion to Dismiss (R. 7) which was denied (R. 12) and points "1" and "2" of "Statement of Points to be relied on upon appeal" (R. 1216), preserve the issue sufficiently to require the Court below to consider the issue properly before it; and, a fortiori, require a decision on the merits of the issue?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 as amended, Title 26, U.S.C. (1989) are:

Section 41: GENERAL RULE.

> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does

not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * * *.

Section 145: PENALTIES.

(a) * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 3616: PENALTIES.

Whenever any person—

(a) FALSE RETURNS. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation enumeration, or assessment intended to be made; or,

(b) * * * *

he shall be fined not exceeding $1,000. or be imprisoned not exceeding one year, or both; at the discretion of the court, with costs of prosecution.

UNIFORM PARTNERSHIP ACT. (Chapter 106½ Illinois Revised Statutes):

Section 21:

"Every partner must account to the partnership for any benefit, and hold as trustee for it any

profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."

Section 24:

"The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management."

Section 25:

"(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(A) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners."

EMBEZZLEMENT BY OFFICER, CLERK, AGENT, SERVANT, SOLICITOR, BROKER OR APPRENTICE (Section 210 of Title 38, Illinois Revised Statutes):

"Be it enacted by the People of the State of 2121 Illinois, represented in the General Assembly: if any officer, clerk, agent, servant, solicitor or broker of any incorporated company, or if any clerk, agent, servant, solicitor, broker, apprentice or officer of any person, co-partnership, society or association, receiving any money, substitute for money or thing of value whatsoever in his fiduciary capacity, shall embezzle or fraudulently convert or appropriate the same or any part thereof

to his own use, or with intent to embezzle, shall take, secrete or otherwise dispose of, or fraudulently withhold, appropriate, lend, invest or otherwise use or apply any money, substitute for money, or thing of value received by him in such fiduciary capacity, or the portion thereof, belonging to his principal, employer or fiduciary, without the consent of the company, person, co-partnership, society or association for or on account of which the same was received by him, he shall be deemed guilty of larceny and shall be punished as provided by the criminal statutes of this State for the punishment of larceny, irrespective, whether any apprentice has or claims to have any commission or interest in such money, substitute for money, or thing of value so received by him."

STATEMENT OF THE CASE

The petitioner was indicted by the March, 1953 Grand Jury for the Northern District of Illinois by filing with the Clerk of the District Court for said District of the indictment found. The petitioner was charged with filing false and fraudulent income tax returns with intent to defeat and evade a large part of the income tax due for the years 1946, 1947 and 1948 in violation of section 145(b) of the Internal Revenue Code of 1939. (R. 3-5)

Two trials were had, the first resulting in a mistrial ordered by the District Court, on motion of the defendant (R. 42) complaining of the conduct of the prosecutor (R. 43); the second trial resulted in a conviction of the petitioner for all three years (R. 1171-1172); and, the imposition of a sentence on each count of two years and a fine of two thousand dollars. The sentences were to run concurrently and the fines were cumulative. (R. 1212-1213)

On appeal to the Seventh Circuit Court of Appeals the conviction for the year 1946 was reversed (Pet. A-16); and the conviction for 1947 and 1948 was affirmed (Pet. A-16). A petition for rehearing was filed and denied (Pet. A-20).

Prior to the first trial the petitioner through his then Counsel filed a motion to dismiss the indictment on the grounds that section 145(b) of the Internal Revenue Code of 1939, upon which the indictment was brought when read together with section 3761(a) of said code and other statutes which are in pari materia therewith amounted to an unconstitutional delegation of authority to the executive branch of the Government (R. 7). This motion was denied (R. 12). The denial of this motion was included as errors in the points relied upon on appeal as points numbered "1" and "2" (R. 1216).

Prior to the first trial your petitioner by present Counsel filed a motion for judgment of acquittal on the grounds that the Government was committed to prove its case by the Net Worth method of determining net income; that the Commissioner of Internal Revenue had determined net income for each year without resort to the Net Worth method; and, that the prosecutor did not have the power to depart from the standard method by which the Commissioner determined the income (R. 12-40), therefore, any evidence adduced on the net worth method was inadmissible: This motion was denied (R. 42); renewed before the second trial and leave to file said motion denied (R. 44); again denied (R. 49); again denied after the opening statement by Government Counsel (R. 57); renewed after the Government rested (R. 1095) and denied (R. 1097); renewed after all the evidence was

adduced (R. 1099) again denied (R. 1114); renewed after verdict (R. 1172) and denied (R. 1210). The denial of this motion was included in the points relied upon on appeal as points numbered "5", "6" (R. 1216).

The Government, over a running objection by the defense (R. 124, 144, 946, 969-970) adduced testimony from over fifty witnesses that they had purchased automobiles from the partnership of which the petitioner was a member at prices alleged to be over the listed sales price; and the Government witness Weber testified that such excesses were not reflected on the books of the partnership and his construction of such testimony and the books was admitted in evidence as Gov. Exh. 279. Weber then testified to the financial transactions of the defendant and his conclusions were admitted in evidence as Gov. Exh. 280. In the testimony supporting Gov. Exh. 280 (the Net Worth Statement) the Government adduced no testimony to prove that the alleged withheld premiums found their way into the items composing the Net Worth. The Government *on page 13* of its main brief on appeal states:

> "Although all of this unrecorded income had been traced into the hands of Achilli and his sales manager, it was not possible to establish by direct proof whether Achilli retained this money for his personal use."

We contended that unless it was shown that the alleged withheld income did find its way into the Net Worth computation — by a showing of assets acquired, or liabilities liquidated — with cash from unexplained sources the Net Worth lacked probative value. The identical cash need not be traced; but, under the rule

of *Holland* v. *U. S.* (348 U.S. 121), the increase in Net Worth must be attributable to such "likely source"; and, a showing made that the increase in Net Worth was from such funds; such as assets paid for in currency, or the currency being deposited to supply the source for check payments.

Here the record is particularly clear that the increased Net Worth was not from unexplained sources. The record predominates with regular banking transactions, direct or through the lawyer partner—there is absent, the usual hordes of cash so prevalent in Net Worth cases. The issue was raised on appeal, but ignored by the Circuit Court; and, again raised on petition for rehearing but the Court decided that point added nothing to the appeal.

The Net Worth statement lacked a reasonably accurate beginning and end. The end was particularly flagrant in its defects. The Court below reversed as to 1946, and affirmed for 1947 and 1948.

The first trial was declared a mistrial as the result of the conduct of the prosecution. The second trial again was marred by misconduct, during trial and in summing up. The act during trial appears at R. 146, 147, 179-180, 183-4. The eighteen acts of misconduct during summing up appear at R. 1174-1182; and, the facts respecting them appear at R. 1182-1206. The defense moved for judgment of acquittal (R. 1172) which was denied (R. 1210). The issue was raised on appeal. The Court below, on appeal, in refusing to reverse on this issue; stated that it "did not condone the prosecutors' unqualified statement" (Pet. A-3); his reference "to the capital stock was unwarranted" (Pet. A-3); and "Government counsel may, at times,

have been an overzealous advocate" (Pet. A-5). Nevertheless, in refusing to reverse it grounded its decision on the curative effect of such objections as were made, and on the failure to specifically object in all other instances; despite the request by the defense—which was granted—that the jury be instructed that the defense had no opportunity to respond to the complained of statements to the jury.

Finally, the defense contended that, if in fact, the defendant did appropriate the alleged over premium receipts to his own use, it was embezzlement from the partnership and not income to the partnership or the defendant. The trial Court refused to instruct the jury on this issue and the Court below affirmed. Hence, from your petitioner's viewpoint, these are the

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. The first question presented, in substance is whether the prosecutor in a criminal tax evasion case —for the purposes of his case in chief as distinguished from corroboration—can ignore and depart from the determination of the Commissioner of Internal Revenue made in a statutory deficiency notice and rely as proof solely upon the Net Worth method of approximating and determining taxable net income. The Court below has decided he can, we maintain he cannot.

This question is one of first impression. It has not been decided by any Court and remains unanswered by the decision of this Court in *Holland* v. *U. S.*, 348 U.S. 121, and companion cases decided in December, 1954.

It is a question of the utmost importance to every taxpayer, and should be decided by this Court. The question arises, in practice, when the Commissioner of Internal Revenue makes a jeopardy assessment in a fraud case; which, is becoming quite an ordinary practice.

This Court in deciding *Holland* v. *U. S.*, 348 U.S. 121, and the other three cases decided at the same time —that is, *David Freidberg* v. *U. S.*, 348 U.S. 142, *Daniel Smith* v. *U. S.*, 348 U.S. 147, and *U. S.* v. *Calderon*, 348 U.S. 160—approved the use of the Net Worth method in criminal tax evasion cases. These four decisions appear to have given the Government and Courts a "green light" for the indiscriminate use of that method. It is time that its use be properly circumscribed. The abuses, inherent in the use of that method, and the ease of convincing a jury thereby, despite the restrictions and cautions imposed by this Court, are fast leading to a denial of justice to taxpayers. Instead of being a means of convicting fraud-practising taxpayers; it is fast becoming a trap for innocent taxpayers and leads to the conviction of innocent persons.

The determination of net income is a very intricate proceeding. The tax return is complex, and composed of items of income and deductions. The Commissioner maintains a well trained staff of experts to audit the returns made. Congress has very wisely, reposed in the Commissioner, without delegation under the 1939 Code, the responsibility of determining net income in a manner that in *his* opinion "clearly reflects the income". (Section 41). The Courts heretofore have been very careful not to disturb the method adopted

by the Commissioner, excepting by a clear showing that he is wrong.

What right then is there in a prosecutor to disregard the Commissioner's findings in this complex field and prove a fraud—primary proof, not as corroboration—by the Net Worth method.

To hold, as did the Court below, that Section 41 has no application to criminal cases—only to civil cases—is to destroy our entire tax structure; and is bound to result in abuse.

Where, as here, the Commissioner has made his findings by regular orthodox adjustments (R. 22-40); and the taxpayer, as is his right, contests such findings before the Tax Court of the United States; and the Commissioner during the four succeeding years does not change his position (R. 22-40); by what authority does a prosecutor during such four year period prosecute by the Net Worth method of proof. We believe, that under such circumstances—the circumstances of this case—the prosecutor should be required to make a showing as a premise for his departure from standard methods that the conditions surrounding the statutory deficiency notices are wrong or no longer exist; that the Commissioner has changed his mind and the Net Worth method does "clearly reflect the income"; and that income cannot otherwise be determined.

If the decision below is permitted to remain the law by failure of this Court to review this question no taxpayer will be safe from prosecution, no matter how honest his return, because some prosecutor decides he and a jury can better decide what a person's income is; whereas, the law (Section 41) restricts the right to

change to the Commissioner personally when, in his opinion another method more clearly reflects the income.

As Mr. Justice Black said in his dissenting opinion in which Mr. Justice Douglas joined in *Berra* v. *United States,* 76 S. Ct. 685, 690:

> "I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. * * * Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

Here, we are dealing with taxable net income—a very complex matter. The law specifically charges the Commissioner with determining taxable net income. When he, with his vast trained organization, specialists in the field, determines taxable net income by making adjustments thereto; and, does not resort to the Net Worth method, there would appear to be no premise for a prosecutor to prove his case solely by the Net Worth method.

It is so easy to follow the line of least resistance, disregard the tax return items, throw out the experts findings and proceed by the Net Worth method to procure convictions based on Net Worth unsupported by proof of fraud.

We humbly submit that Net Worth evidence to be admissible at all, must be grounded on the statutory requirements that the Commissioner, personally, is of the opinion that the method used does not "clearly reflect the income" and the Net Worth method does "clearly reflect the income".

Prosecutors, juries, and for that matter Courts, cannot be expected to comprehend all the intricacies of a complicated income tax statute; and, where the Commissioner who is invested by Congress with quasi-judicial powers fails to use the Net Worth method, others should not be permitted to do so.

The Court below here is the Seventh Circuit, the same question has been raised in the Fifth Circuit in *Pinder* v. *United States,* Docket No. 15,784, by this Counsel (Carl J. Batter) and; a possible conflict may arise between the Circuits too late to provide a remedy in the case at bar.

We feel that there is a most pressing need for this Court to speak on that subject further and that certiorari should be granted.

2. The prosecutor did not as a foundation for his Net Worth proof offer any testimony that income could not be determined by the standard method of making adjustments to the income reported. The Commissioner, personally, is the only person authorized by law to ignore the return and resort to the Net Worth method, if, in his opinion the Net Worth method clearly reflects the income (Section 41). The defense made a running objection to the admission of testimony respecting Net Worth. Is such evidence admissible without a foundation that the Commissioner had recanted from his statutory determination and found the Net Worth method did clearly reflect income? The Court below held it was admissible; we think not.

This question, like number 1, is not covered by *Holland* v. *U. S.*, 348 U.S. 121, and should be decided by this Court. It is a case of first impression. All the

reasons set forth under "1" apply with equal force here, and counsel has raised the issue in *Pinder* v. *U. S.* pending in the Fifth Circuit, Docket No. 15,784; but, again the possible conflict between circuits will come too late to provide a remedy here.

We respectfully submit, that certiorari should issue.

3. The third question relates to the probative value of the Net Worth computation as here adduced. Here, the Net Worth evidence adduced shows glaring errors in the Net Worth computation at the end of the period. The Court below does find "conflicting testimony with respect to each of them" (Pet. A-9). The items are sufficiently large, to wipe out entirely the alleged increase in Net Worth.

This Court in *Holland* v. *U. S.*, 348 U.S. 121, stated at page 125:

> "Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use."

and at page 129:

> "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

The Court below, despite its finding of conflict, held "there was sufficient evidence to submit to the jury upon each of these matters" (Pet. A-10). We submit that where, as here, the jury patiently listens to testimony over a period of thirty days, and upon retirement to the jury room depends on its recollection of the testimony, with only the Government Net Worth

Exhibit (No. 280) before it, we develop a situation referred to in *Holland* v. *U. S.*, 348 U.S. 121, 128, as

> "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

and the appellate court should not be content, where it has the actual transcript before it and can reread and study it, and finds conflicts, be content to hold "there was sufficient evidence to submit to the jury upon each of these matters." (Pet. A-10) We submit it should resolve such conflicts and unless the proof is beyond a reasonable doubt it should reverse the judgment.

For the years 1947 and 1948 the Court below affirmed despite the fact that included in 1947 are items of Red Lion, Inc., about which the Court below states: (Pet. A-3)

> "We are directed to nothing of record which indicates when or by whom Red Lion, Inc., was incorporated, or who owned its corporate stock.
>
> The Red Lion transactions are silent in this respect."

Despite this finding by the Court below and the further fact that the 1947 Net Worth computation of the petitioner contains a number of items contracted for by Red Lion, Inc. (Exh. Vol. pp. 46, 47, 50, 52, Gov. Exh. 113, 114, 116, 117), the Court below approved the Net Worth method.

Again, at the end of the Net Worth period the Court below finds conflicting testimony respecting a number of items, that is $12,000. (Pet. A-9), $7,500. (Pet. A-10), and $15,000. (Pet. A-10). Instead of resolving these conflicts, it held that: (Pet. A-10)

> "There was substantial evidence which, if believed, supported the requisite finding that defendant willfully understated his income in both 1947 and 1948, and that black market receipts received by him in the sale of automobiles was the likely source of his enhanced net worth."

whereas, this Court in *Holland* v. *U. S.*, 348 U.S. 121, at 129, states:

> "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

We thereupon filed a petition for rehearing in which we analyzed the testimony respecting each asset and liability, clearly demonstrating the "black market receipts" did not form any part of the increased Net Worth. For the year 1947 only $2,750. was testified to as being cash (Pet. for Reh., p. 12-A); and for the year 1948 not one cent was shown to have been from "black market receipts" (Pet. for Reh., p. 26-A). It will also be noted that the Government in its Brief on Appeal admitted at page 13:

> "Although all of this unrecorded income had been traced into the hands of Achilli and his sales manager, it was not possible to establish by direct proof whether Achilli retained this money for his personal use."

Despite this Government confession and the analysis (Pet. for Reh., App. 1-A to 27-A) the Court below responded at page Pet. A-17 hereof.

> "We think nothing is added thereby to the points raised and argued on appeal. We adhere to our

judgment affirming the conviction as to the two counts."

By ignoring the facts of the analysis (Pet. for Reh., pp. 1-A to 27-A) it places upon the defendant the burden of proof; where in fact it remains with the prosecution throughout.

We submit that where a Court below so disregards the tests directed by this Court, it calls for the exercise of the power of supervision by this Court and certiorari should be granted.

4. The fourth question goes to the Court's failure to adhere to two requisites of the Net Worth method pronounced by this Court in *Holland* v. *U. S.*, 348 U.S. 121. Both appear at pages 137-138, and read:

> "'Increases in net worth, *standing alone*, cannot be assumed to be attributable to currently taxable income. But proof of *a likely source*, from which the jury could *reasonably find that the net worth increases sprang*, is sufficient. (Emphasis supplied)

Here the evidence is clear, that assuming arguendo the petitioner did withhold income from the partnership, such income did not find its way into the component items of the Net Worth computation.

An analysis was prepared for the Court below (App. to Pet. for Rehearing, pp. 2a-27a), clearly showing the proof where adduced to be that the increases were not attributable to such withheld income. The origin of the funds used in acquisition of assets or liquidation of liabilities appear throughout the record. They are straight banking transactions, conducted in the open, and there is a complete absence of purchases by cash.

If, the cash from premiums on automobile sales found its way into the defendant's bank account, so that source would have been available to meet the needs of purchases, the Government would have shown it.

With practically a complete severance between purported cash premiums supposedly unreported income, the Net Worth computation and its increases cannot be assumed to be "attributable to currently taxable income" and there can be no "likely source" that a jury can reasonably find to be what the Net Worth increases "sprang" from.

The Court below concluded that this analysis (App. to Pet. for Rehearing, pp. 2a-27a) "added nothing" to the cause.

Under these circumstances the Court below has not given proper effect to an applicable decision of this Court, and the failure to do so calls for an exercise of this Court's power of supervision.

We respectfully submit that certiorari should issue.

5. The fifth question relates to embezzlements from the partnership of which the petitioner was a member. The embezzlements were not condoned, but the subject of a suit by the other partner (Deft. Exh. 5, R. 1049-51) in 1951. Who embezzled the funds is uncertain. the Government in its brief to the Court below, stated at page 13:

> "Although all of this unrecorded income had been traced into the hands of Achilli and his sales manager, it was not possible to establish by direct proof whether Achilli retained this money for his personal use."

If the sales manager embezzled, such embezzlements cannot be income to the petitioner. If the petitioner embezzled, such embezzlement was not condoned—in

fact suit for restitution was instituted; the embezzlement comes squarely within the rule of *Wilcox* v. *Com. of Int. Rev.* (327 U.S. 404). Under the laws of Illinois (Sections 21, 24, 25, Uniform Partnership Act, Chapter 106½ Illinois Revised Statutes), a partner, who is an *agent* of the partnership appropriating funds is an embezzler (Sec. 210, Title 28, Ill. Revised Statutes).

Assuming arguendo, that the defendant did appropriate to his own use the proceeds of the premiums exacted on cars sold. The Court below finds (Pet. A-2):

> "The black market premium was not recorded or reported. These premium sales seem to have been concealed from defendant's co-partner, Gromer; they were not reported in his individual income tax returns."

The Court below then holds that a partner cannot embezzle from his partnership (App. A-13). We submit this is contrary to Illinois law. (See pages 8, 9 hereof). It further holds (Pet. A-16) that:

> "It was incumbent upon defendant to assert and prove such embezzlement if he wanted to rely upon such a defense. He is not entitled to instructions resting upon mere speculative assertions manufactured wholly from thin air."

We submit that the burden of proof rests with the prosecution at all times. The prosecution's own proof establishes embezzlement—it is not the burden of the defense to prove embezzlement. It is the burden of the prosecution to prove it was not embezzlement. Embezzled funds under *Com. of Int. Rev.* v. *Wilcox*, 327 U.S. 404, uncondoned is not income. The defense did establish (Def. Exh. 5) that it was not condoned.

Suit was instituted by the other partner in 1951 charging misappropriation of funds.

The Court below has decided a question of local law in conflict with applicable local law; and has not given proper effect to the decision of this Court in *Com. of Int. Rev.* v. *Wilcox*, 327 U.S. 404.

We submit that certiorari should issue.

6. The sixth question pertains to the conduct of the Government during trial and in his final summing up to the jury. We list nineteen different acts (R. 1174-1182) and our version of the record (R. 1182-1206). The Court below disposes of them as follows: one was cured (during trial) by the trial Court sustaining defense Counsel's objection to the remark which was stricken; one was invited by defense counsel's alleged incorrect statement to the jury; one to which objection was made, was overruled, but the error was inconsequential; and the other sixteen were not objected to by defense counsel at time of utterance.

The Court below does not excuse the remarks objected to; in fact makes three observations set forth in the question presented. The Court below holds, absent an objection made at the time, the petitioner may not now complain.

At the close of the final argument by Government Counsel, defense Counsel, addressed the Court as follows: (R. 1150-1151)

> "Mr. Batter: If the Court please, the statement of counsel in his closing argument this morning is so at variance with the truth and so at variance with the record, and bearing in mind that I am left in the position where I am unable to answer him before the jury, I would like an instruction

from the Court to the jury to the effect that the regular procedure is for Government counsel to open and close, and that I have no opportunity to speak again.

I don't think in justice the record should be left in the position where counsel takes net income as reported on the individual return, and tries to work from that with his deductions, ignoring the partnership returns as they were returned, taking items of $10,800, which is a receivable, and treating it as a disbursable item, and all the other items he went through, without letting the jury know that I am precluded from saying anything more.

I would like an instruction to the jury that I do not have a second opportunity to talk to them.

The Court: Well, I will instruct the jury accordingly then."

Considering defense counsel's position—his inability to respond; his fear of alienating the jury by numerous objections (two were made); and likely charges of harassing the prosecution, defense counsel did the best he could by immediately, at the conclusion of Government counsel's argument, addressing the Court as above.

We don't think we came too late, we were governed by the psychology of the drama before the jury, and made known the flagrant abuse. As was stated by this Court in *N.Y. Central R. Co. v. Johnson*, 279 U.S. 310 at 318:

> "The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice."

To hold against the petitioner on grounds of failure to object under these circumstances is a miscarriage of justice and a departure from the accepted and usual course of judicial proceedings, as to call for this court's power of supervision.

We respectfully submit that certiorari should issue.

7. The seventh question raises the point of exclusion from a general statute (Section 145(b) 1939 Int. Rev. Code) of an offense specifically dealt with in specific statute (Section 3616(a) 1939 Int. Rev. Code). The former pronounces a felony with heavy penalties; the latter pronounces a misdemeanor with corresponding lighter penalties. Both statutes pertain to an intent to defeat or evade income taxes. The question was not answered below—it should be decided.

This Court recently decided *Berra* v. *United States* (76 S. Ct. 687) and confined the issue to the propriety of the trial court's refusal to give the jury an instruction that it may choose between the misdemeanor statute and the felony statute. This Court held the refusal to give the instruction proper on the grounds that it was a question of law for the Court to decide and not a question of fact to be left to the jury.

This question is of the utmost importance in every criminal tax evasion case under the Internal Revenue Code of 1939. There are literally hundreds of criminal tax evasion cases pending in the District and Appellate Courts of this country. This Court considered it important enough to grant certiorari and decide *Berra* v. *United States*, 351 U.S. 131, 76 S. Ct. 685; however, there the issue was confined to was it or was it not error for the trial Court to refuse an instruction leaving to the jury the decision of whether the crime

was a misdemeanor or a felony. The question should be settled by this Court in the public interest, because, here the fundamental issue is raised—not a procedural question.

Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939, the first a felony, the latter a misdemeanor cover the same offense. Here the sentence was imposed as a felony and exceeds the maximum penalty of a misdemeanor. We contend the felony penalty is invalid and beyond the jurisdiction of the Court to impose. Being jurisdictional it can be raised at any stage of the proceeding.

The Court below declined to consider the issue on its merits on the ground that it had not been raised in the trial Court, nor on appeal until petition for rehearing. The Court below based its decision on its rationalization of *Berra* v. *United States*, 76 S. Ct. 685.

In *Berra* v. *United States*, 76 S. Ct. 685, this Court —for the purposes of that case—accepted arguendo— the position of both litigants, the Government and the taxpayer, that is, that the same proof was required for the misdemeanor and the felony; but decided the case solely on the right to the instruction to the jury.

Here that is not involved. Here the issue is properly raised as a question of law. It was raised before trial in the trial Court, preserved as error in the appeal, and renewed by petition for rehearing.

The issue of a misdemeanor versus a felony is of paramount importance in all criminal prosecutions brought under the Internal Revenue Code of 1939 and should be decided by this Court on the merits in this case and certiorari should issue.

8. The eighth question raises an issue springing from the action of the Court below in declining to review the judgment of the trial court on the grounds that the right was not preserved below.

The Court below, relying on this Court's decision in *Berra* v. *The United States of America* (76 S. Ct. 685), by analogy holds that: (R. A-18)

> "* * * the question * * * certainly cannot be raised on this appeal in which there was no intimation of error below in the imposition of sentence or on appeal until the petition for rehearing was filed."

We contend that our petition for rehearing goes to the jurisdiction of the trial court's imposing a sentence beyond its powers, if the crime is a misdemeanor. A question of jurisdiction can be raised at any time—whether preserved below or not. Nor can the appellate court dispose of the case without passing upon the merits of the jurisdictional question, even though not raised below. By by-passing the merits the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The defense first raised the issue by motion to dismiss (R. 7). This motion was denied (R. 11-12). It was preserved on appeal by points "1" and "2" of "Statement of Points to be relied on upon Appeal" (R. 1216). It was not argued on appeal—but that does not constitute a waiver. It was argued on petition for rehearing, and the Court below erred in by-passing the merits and holding the issue raised too late.

As a matter of law, the attack on the sentence, being jurisdictional, can be raised any time; therefore, even if the Court below was correct respecting the tardiness in raising the issue, it was required to decide the merits.

We respectfully submit that certiorari should issue.

9. The ninth question takes issue with the Court below on the sufficiency of the record to require a decision on the merits of the invalid sentence issue.

Before the first trial, the defense, by previous counsel made a motion to dismiss together with alternative motions. Paragraph 1 of that motion (R. 7) reads:

> "1. Moves that the indictment and each count thereof be dismissed, on the grounds (a) that the statute on which said indictment and each of said counts is founded, namely, Section 145(b) of the Internal Revenue Code, when read together with Section 3761(a) of the Internal Revenue Code and other statutes which are in pari materia therewith, amounts to an unconstitutional delegation of authority to the executive branch, in violation of Article 1, Section 1 of the Constitution of the United States manifesting the doctrine of separation of powers, and in violation of the due process clause of the Fifth Amendment of said Constitution; and (b) that the executive branch has employed unconstitutional practices and procedures in the enforcement of said Section 145(b), as applied to the defendant herein, in violation of the due process clause of the Fifth Amendment of said Constitution."

The aforesaid motion was denied (R. 12). It was renewed after verdict and before sentence (R. 1172) on May 25, 1955. It was denied on May 27, 1955

(R. 1210). On June 16th, 1955, the trial Court entered judgment reading in part as follows: (R. 1212)

> "It is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of 145(b), Int. Rev. Code; 26 U.S.C., Sec. 145(b) (Wilfully and knowingly attempting to defeat and evade large parts of the income tax due and owing by him to the U.S. by filing and causing to be filed with the Coll. of Int. Rev. false and fraudulent income tax returns.) as charged. * * *".

Thereupon the Court imposed a sentence in excess of that provided by section 3616 I.R.C. 1939. (R. 1212)

Thereafter on the 19th day of July, 1955, the defense filed its Statement of Points to be relied on upon appeal, points "1" and "2" of which read: (R. 1216)

> "1. The indictment failed to set out any crime in violation of the statutes of the United States.
>
> 2. The trial court erred in refusing to grant the defendant's motion to dismiss the indictment."

We submit that the record on appeal was sufficient to place the issue before the Court below; and it was error to decline to pass upon the merits of the issue.

By by-passing the merits the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We respectfully submit that certiorari should issue.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court on a day to be deter-

mined a full and complete transcript of the record of all the proceedings of such Court of Appeals had in this cause, to the end that the proceedings and decisions therein may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the years 1947 and 1948 may be reversed; and that the petitioner be granted such other and further relief as may seem proper.

CARL J. BATTER
910 Seventeenth St., N. W.
Washington 6, D. C.

FRANK J. GAGEN, JR.
29 So. La Salle St.
Chicago 3, Ill.

ANNA R. LAVIN
1 North La Salle St.
Chicago 3, Ill.
Attorneys for Petitioner